

Supreme Court, U. S.

F I L E D

DEC 21 1976

MICHAEL RODAK, JR., CLERK

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

No. —————

76-848

Delmas McClendon, Glenn O. Young, Wolford Conover, I
Iva Louise Conover, Stuart Ratcliff, Stanley Caha, Greta
Puckett, and Vangle Echohawk,

Petitioners,

vs.

Lee Slater, Secretary of the State Election Board;
Elaine Allman, Chairman, State Election Board;
Burns Hargis, Vice-Chairman, State Election Board,
Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES
FROM THE SUPREME COURT OF OKLAHOMA**

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December 20, 1976

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OCTOBER TERM 1976

I

Delmas McClendon, Glenn O. Young,
Wolford Conover, Iva Louise Conover,
Stuart Ratcliff, Stanley Caha, Greta
Puckett, and Vangie Echohawk,

Petitioners,

v.

Lee Slater, Secretary of the State
Election Board; Elaine Allman,
Chairman, State Election Board;
Burns Hargis, Vice-Chairman, State
Election Board,

Respondents.

COME NOW the Petitioners and for Petition of Certiorari,
do herein submit the following:

OPINIONS BELOW

Petitioners do appeal from the decision of the Oklahoma Supreme Court for the State of Oklahoma. The opinion of the Oklahoma Supreme was entered on the 19th day of August, 1976, and the Order denying petitioners' Petition for Re-Hearing was entered on the 24th day of September, 1976.

The opinion of the Court is officially reported as 554 P.2d. 774 (August 19, 1976) and has been appended hereto as Appendix A at page A1. The Order denying the Petition for Re-Hearing has been appended hereto as Appendix B at page B1.

II

JURISDICTION

The petitioners invoke the jurisdiction of this Court to review the judgment of the Oklahoma Supreme Court, because these petitioners have constitutionally protected rights of Freedom of Expression and Association under the First and Fourteenth Amendments to the United States Constitution, which were denied to them virtue of invidiously discriminatory state actions by the Oklahoma Supreme Court and Oklahoma Legislature.

The violation of these petitioners' First and Fourteenth Amendment rights was so shameful that this Court does have further jurisdiction over this matter, inasmuch as Article IV, Section 4 of the United States Constitution requires that the United States guarantee to each State a Republican form of government.

III

QUESTIONS PRESENTED FOR REVIEW

I

May the State of Oklahoma terminate the membership of these petitioners in the American Party and thereby deny them status as presidential electors and also deny their right to politically associate as members of the American Party, by virtue of the election laws of the State of Oklahoma, which invidiously discriminate against these petitioners and their chosen political party affiliation, contrary to the provisions of the First and Fourteenth Amendments to the United States Constitution and thereby deny these petitioners and other citizens similarly situated, the right to a Republican form of government as guaranteed by Article IV, Section 4, of the United States Constitution?

II

Since these petitioners were not able to cast their votes for the electoral candidates for President or Vice-President of their choice and since the same could not be accomplished even by a write-in vote, then, have the election laws of the State of Oklahoma not only denied these petitioners their First and Fourteenth Amendment rights but have also denied to them that guarantee of a Republican form of government required by Article IV, Section 4 of the United States Constitution?

IV

CONSTITUTION AND STATUTES INVOLVED

Article IV, Section 4 of the United States Constitution:

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

The First Amendment to the United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 26, Oklahoma Statutes Annotated, Sec. 1-109:

Any recognized political party whose nominee for Governor or nominees for electors for President and Vice President fail to receive at least ten percent (10%) of the total votes cast for said offices in any General Election shall cease to be a recognized political party. Said party may regain recognition only by following the procedure prescribed for formation of new political parties. The State Election Board shall proclaim the fact of a party's failure to receive a sufficient number of votes and shall order that said party cease to be recognized.

Title 26, Oklahoma Statutes Annotated, Sec. 1-110:

The secretary of each county election board shall, within sixty (60) days after such proclamation by the State Election Board, change to Independent the party affiliation on the registration form of each registered voter of a political party which ceases to be a recognized political party.

Title 26, Oklahoma Statutes Annotated, Sec. 1-107:

Recognized political parties shall include parties whose candidates' names appeared on the General Election ballot in 1974, and those parties which shall be formed according to law.

Oklahoma Constitution, Article III, Section 5:

The Legislature shall enact laws providing for a mandatory primary system, which shall provide for the nomination of all candidates in all elections for State, District, County and Municipal offices, for all political parties, including United States Senators, except for the office of Presidential Electors who shall be nominated by the regularly called conventions of the various political parties and the chairman and secretary of each political party convention shall certify the names of said nominees to the Secretary of State Election Board: Provided, however, this provision shall not exclude the right of the people to place on the ballot by petition any non-partisan candidate. (Emphasis Added.)

V

STATEMENT OF THE CASE

On the 6th day of July, 1976, these petitioners sought to have their names placed on the November, 1976 General Election Ballot in the State of Oklahoma, by the timely filing, with the respondents, of certifications as Presidential Electors and oaths as Presidential Electors of the American Party (see Appendix C at page C1). Respondents refused to accept the aforementioned certifications and oaths of these petitioners as Presidential Electors, on the ground that said electors were not members of a recognized political party in the State of Oklahoma, by virtue of 26 Oklahoma Statutes Annotated, Section 1-107. Thereafter, petitioners brought suit for a Writ of Mandamus in the Supreme Court of Oklahoma, requesting that the respondents be compelled to place their names on the 1976 General Election Ballot as Presidential Electors for the American

Party, since petitioners were all qualified and registered voters in the State of Oklahoma, and since they were qualified and pledged as American Party Presidential Electors to cast their votes for Thomas Jefferson Anderson for President of the United States and Rufus Shackelford for Vice-President of the United States.

In the Court below, petitioners stated that the provisions of 26 Oklahoma Statutes Annotated, Section 1-109 and 26 Oklahoma Statutes Annotated, Section 1-110, had without their knowledge or consent, and in violation of their right of freedom of association changed their status as members in the American Party to the status of Independent party affiliation on their registration form, as registered voters, since their American Party had ceased to exist, by virtue of 26 Oklahoma Statutes Annotated, Section 1-109. This being the case, the petitioners argued that they could not be denied status as American Party Presidential Electors, or for that matter, as Independent Electors, since the Supreme Court had previously held in Eugene McCarthy, et al. v. Slater, et al., 553 P.2d. 489 (July 23, 1976) (See Appendix D at page D1.) that Presidential Elector status could not be denied to independent electors. Thus, petitioners argued, in the first instance, that the First and Fourteenth Amendments to the United States Constitution protected their right to politically associate as members of the American Party, despite the election laws of the State of Oklahoma which required them to be members of a recognized political party. The petitioners further argued that the previous decision of the Oklahoma Supreme Court in the Eugene McCarthy case demanded that they be allowed equal protection of the law, pursuant to the Fourteenth and First Amendments to the U.S. Constitution and thereby granted access to the 1976 General Election Ballot as independent electors. The petitioners further argued that Article 3, Section 5 of the Oklahoma Constitution recognized all various political parties of which the American Party was one, and that by virtue of the State Constitution, as well as by the First and Fourteenth Amendments to the United States Constitution that these petitioners could not be denied equal protection of the law regarding their chosen political

affiliation as members of the American Party; nonetheless, the Oklahoma Supreme Court, in an opinion rendered on the 19th day of August, 1976, denied each and every claim which petitioners made and boldly declared in its decision that the Election Code of the State of Oklahoma was not unconstitutional and did not invidiously discriminate against these petitioners as regards their chosen political party association in the American Party. However, the Supreme Court did not substantiate its finding upon any evidence what so ever and these petitioners demanded on September 1, 1976, a re-hearing and further demanded that the attorney general of the State of Oklahoma present evidence to the Court substantiating the Court's conclusion that the Election Code of the State of Oklahoma was not invidiously discriminatory in its application to these petitioners and petitioners did produce statistical evidence with their application for rehearing which proved the invidious discrimination of the Oklahoma Election Laws upon them (see Appendix E at page E1) and did make demand for further oral argument.

Whereupon, the Supreme Court without opinion and in a summary manner, denied petitioners' request for a re-hearing, without further comment and did further deny petitioners' request for presentation of oral argument on the matter, by order entered of record the 24th day of September, 1976, (see Appendix B at page B1) despite the fact that a persuasive dissent by the Vice-Chief Justice of the Oklahoma Supreme Court declared that the Oklahoma election laws were an unconstitutional infringement of the rights of the members of a political party (see Appendix A at page A10). From the said order denying petition for re-hearing, these petitioners appeal for a Writ of Certiorari.

VI

ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI

In the Williams v. Rhodes, 393 U. S. 23 (1968) case, the State

of Ohio attempted to justify its highly restrictive provisions by arguing that without them, a large number of parties might qualify for the ballot and the voters would be confronted with a choice so confusing that the popular will could be frustrated. The Court struck this alleged danger down as being no more than "theoretically imaginable" because prior to the Ohio legislation, very few parties attempted to qualify for ballot position and the Court held that remote danger could not justify the immediate and crippling impact on the basic constitutional rights involved.

The similar situation exists in the State of Oklahoma, except for the added burden that petitioners' membership in the American Party has been completely extinguished and transferred to Independent Party registration status by operation of law, 26 Oklahoma Statutes Annotated, Section 1-110, without their knowledge or consent.

Nonetheless, the State of Oklahoma, through the respondents herein as well as by and through the Supreme Court of Oklahoma, assert that 26 Oklahoma Statutes Annotated, Sec. 1-109, can lawfully terminate the existence of the American Party status of these petitioners and thereby denies them recognized political party status and that such laws are not invidiously discriminatory of these petitioners' First and Fourteenth Amendment rights.

At this juncture, the vital distinction between the Williams v. Rhodes case, and every other First Amendment case of political association which this Court has decided, becomes clearly discernable. Petitioners' right to ballot access as American Party Electors was not merely regulated, but their right to associate as American Party members was absolutely terminated by the election laws of the State of Oklahoma. In Jenness v. Fortson, 403 U.S. 431 (1971), this Court recognized that in the State of Georgia if a "political party" failed to gain sufficient support at an election, then it could properly revert to the status of a "political body" in accordance with Georgia law without contravening the First or Fourteenth

Amendments. However, in the present case, petitioners not only lost all their political rights of association as American Party members and access to ballot position, but were also made members of a completely different political party, i.e., The Independent Party, by virtue of the Oklahoma Election laws. The Oklahoma Election laws are not only an attempt to freeze the status quo of the Republican and Democratic parties which retained ballot position after the 1974 General Election in the State of Oklahoma, but also terminated the existence of these petitioners as members in the American Party and established a recognized political party for them in the form of the Independent Party. This Court has recognized that a State may reasonably regulate access to the ballot, but it has never authorized a State to terminate First and Fourteenth Amendment rights of political association or freedom of expression. Such election laws of the State of Oklahoma which are presented for review here have operated to terminate these petitioners' rights of political right to associate, contrary to the First and Fourteenth Amendments.

In N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958), this Court said that compelled disclosure of membership lists of N.A.A.C.P. members in the State of Alabama would abridge indispensable liberties of speech and association, due to the fact that governmental action could thereafter interfere with freedom of assembly once the privacy of an association had been disclosed. Petitioners herein have been compelled to forfeit their right to associate as American Party members by governmental action and irrespective of any right which these petitioners had in privately associating as American Party members was destroyed by governmental action which required them to be members of the Independent Party. As was stated in American Communications Ass'n. v. Douds, 339 U.S. 382 (1950) at page 402:

A requirement that adherents of particular religious faiths or political parties wear identifying arm bands, for example, is obviously of this nature.

Why, then, should these petitioners be caused and forced by over-

burdensome and invidiously discriminatory election laws of the State of Oklahoma to wear the "armband" of the Independent Political Party in order to secure the right to freely associate as a recognized political party?

A cardinal purpose of the First Amendment was to keep American government out of the business of thought control. Stanley v. Georgia, 394 U.S. 557, 565 (1969). This purpose is powerfully expressed in Jefferson's Bill for Establishing Religious Freedom, to which the Supreme Court has repeatedly looked as a guidepoint in construing the Amendment:

Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness... that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy... that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order... A Bill for Establishing Religious Freedom (1786), Sec. I, 12, Hening, Statutes of Virginia (1823), 84-85.

Clearly, these petitioners sought to do nothing more than associate as American Party members and vote as Presidential Electors for their chosen candidate. This Court has consistently held that:

All procedures used by a State as an integral part of the election process must pass muster against charges of discrimination or of abridgement of the right to vote. Moore v. Ogilvie, 394 U.S. 814, 819 (1969);

and further, that:

A statutory scheme that blocks minority party access to the electoral process unjustifiably invades the right to vote and to associate. Williams v. Rhodes, 393 U.S. 23, 31 (1968); Lubin v. Ponish, 415 U.S. 709, 716 (1974); Storer v. Brown, 415 U.S. 724 (1974).

Moreover, these petitioners could not even write in their chosen candidate on the ballot as minority parties were able to do in the Jenness v. Fortson case, since they were required and compelled to use pre-programmed election machines to cast their ballots which made it impossible for them to even consider writing in their names on the ballot as Presidential Electors for the American Party candidates.

Mr. Justice Holmes in the case of Abrams v. United States, 250 U.S. 616 at page 624 best expresses why these petitioners' case should be reviewed by this Court:

When men have realized that time has upset many fighting faiths, they may come to believe men more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment.

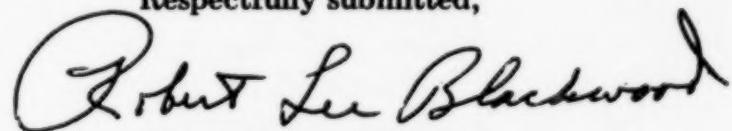
Our great Constitutional experiment will fail unless these petitioners and others similarly situated have the right to freely associate with their chosen political parties and participate in the free exchange of ideas that take place at the ballot box. Otherwise, tyranny begins when these petitioners and others cannot hope to participate in the expression of their political beliefs by membership in their chosen political party by virtue of State Election Laws

which terminate their right of association and membership in their chosen political party. Indeed, no State can guarantee to its citizens that a Republican form of government in our country will continue to exist when it arbitrarily terminates the right of its people to associate and when it further capriciously denies them the right to participate in the selection of the leadership of their nation by a decision of its State Supreme Court which clearly denies to the people Equal Protection of the Law. This is what the State of Oklahoma has done to these petitioners. This matter must be reviewed to preserve not only the rights of these petitioners but also to preserve our Republican form of government.

Thus, the Oklahoma Election Code on its face and as applied by the Oklahoma Supreme Court violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that it has imposed and imposes upon a class, of which these petitioners are members, additional burdens not imposed upon that class of citizens within the State of Oklahoma who are classified as members of a political party and those citizens within the State of Oklahoma who were granted presidential elector status by the Oklahoma Supreme Court as independents by the McCarthy v. Slater case. Further, the operation of the Oklahoma Election Code has created and creates a chilling effect upon petitioners' exercise of their freedom of speech and association, and renders nugatory any exercise thereof with regards to the presidential election process since the only other means by which these petitioners could have cast their votes for the Presidential and Vice-Presidential Electors of their choice would have been by write-in vote. However, the Election Code of the State of Oklahoma makes absolutely no provision for write-in votes in this instance. Therefore, if these petitioners had no way of expressing themselves at the ballot box, then, the State of Oklahoma has totally failed to provide a method by which a form of Republican form of government can be

perpetuated in the State of Oklahoma contrary to the provisions of Article IV, Section 4 of the United States Constitution.

Respectfully submitted,



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APPENDIX A

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33 of this court on the 20th day of December, 1976, I mailed three true and correct copies of the foregoing PETITION to the counsel of record of the respondents by placing the same in the United States Postal Service, with first class postage prepaid and addressed to said counsel of record as follows:

Mr. Michael Cauthron, Esq.
Assistant Attorney General
State Capitol Building
Oklahoma City, Oklahoma 73105



Robert Lee Blackwood

554 PACIFIC REPORTER, 2d SERIES 774 Okl.

Delmas McCLENDON et al., Petitioners,

v.

Lee SLATER, Secretary of the State Election Board, et al., Respondents.

No. 49974.

Supreme Court of Oklahoma.

Aug. 19, 1976.

Rehearing Denied Sept. 24, 1976.

Page 775 Okl.

ORIGINAL PROCEEDING.

An application to assume original jurisdiction and petition for writ of mandamus to require Secretary of the Oklahoma State Election Board to file and place names of petitioners on the Oklahoma November 1976 General Election ballot as Presidential Electors for Thomas Jefferson Anderson for President and Rufus Shackelford for Vice-President of the United States on the American Party ticket.

JURISDICTION ASSUMED, WRIT DENIED.

Robert Lee Blackwood, Tulsa, for petitioners.

Michael Cauthron, Asst. Atty. Gen., State of Oklahoma, for respondents.

DOOLIN, Justice.

To what extent may this sovereign state regulate the presidential election process by its election laws?

The petitioners in this matter, who seek mandamus directed to the Secretary of the State Election Board to place them on the (page 776 Okl.) general election ballot of November 1976, suggest that no regulation is permissible. They submit that the power to regulate and legislate as to rules concerning presidential electors has been reserved in the people under the Ninth Amendment to the Constitution of the United States and Art. V, § 1 of the Constitution of the State of Oklahoma.

They also argue the 1st and the 14th Amendments to the Constitution of the United States guarantee to petitioners free speech and the right to associate and to equal protection of the laws, thus rendering Oklahoma's statutes unconstitutional when they attempt the regulation of the election of presidential electors.

We disagree with both of petitioners' contentions.

(1) Art. II, § 1, cl. 2 of the United States Constitution provides:

"Each State shall appoint in such Manner as the Legislature thereof may direct, a Number of Electors equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: * * *" (Emphasis supplied).

This article is the source of the state's power, if any, to regulate presidential elections. Art. II cannot and does not enumerate a limitation, lowering in rank or disparagement of the rights of the people guaranteed or retained under the 9th Amendment to the United States Constitution.

Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) acknowledges this constitutional provision grants extensive power to the state to pass laws regulating the selection of electors.¹ Indeed it has been said, speaking of the power conferred to the states by Art. II of the United States Constitution, in McPherson v. Blacker, 146 U.S. 1, 13 S.Ct. 3, 36 L.Ed. 869 (1908):

"The clause of the Constitution does not read that the people or the citizens shall appoint, but that 'each state, shall' ... in such manner as the legislature thereof may direct ..." (Quotation theirs).

(2,3) It is fundamental that each state and its Legislature, under a Republican form of government possess all power to protect and promote the peace, welfare and safety of its citizens. The only restraints placed thereon are those withdrawn by the United States Constitution and the state's fundamental law. Art. V, §§ 1 and 2 express that these reservations or withdrawals in the people under the Constitution of the State of Oklahoma are two in nature and as explicitly set out in Art. V, § 2 to be the "initiative" and the "referendum" processes. For our purpose, no other withdrawal or restraint is placed upon the broad fundamental powers of this state's Legislature by Art. V of the State Constitution.

Prior to 1960 and from the time of statehood Art. III § 5 of the Oklahoma Constitution mandated a primary election system for all candidates including presidential electors. At the primary election on July 5, 1960, state question 388 amending Art. III § 5 was approved by the people and provided a system of nomination for presidential electors by certification to the Secretary of the State Election Board. In both constitutional provisions the right of the

¹The Supreme Court of Nebraska in 1948 said:

This clause recognizes "that the people act through their representatives in the Legislature and leaves it to the Legislature exclusively to define" State ex rel. Beeson v. Marsh, 150 Neb. 223, 34 N.W.2d 279 (1948).

people to place on the ballot by petition any non partisan candidate was specifically recognized. 26 O.S.Supp.1975 § 10-101² (page 777 Okl.) as thereafter enacted has not in our opinion restricted or narrowed the constitutional provisions of the 1960 amendment.

(4) We hold that 26 O.S.Supp.1975 § 10-101 is a proper exercise of the power granted by Art. II of the United States

²26 O.S.Supp.1975 § 10-101. "Nomination of Presidential Electors-Certification: The nominees for Presidential Electors of any recognized political party shall be selected at a statewide convention of said party in a manner to be determined by said party. The nominees for Presidential Electors shall be certified by said party's chairman to the Secretary of the State Election Board no fewer than ninety (90) days nor more than one hundred eighty (180) days from the date of the General Election at which candidates for Presidential Electors shall appear on the ballot. Failure of a political party to properly certify the names of its nominees for Presidential Electors within the time specified shall bar such party from placing any candidates for Presidential Electors on the ballot at said election."

26 O.S.Supp.1975 § 10-102. "Oath for Presidential Electors: Every nominee for Presidential Elector shall subscribe to an oath, stating that said nominee, if elected, will cast his ballot for the persons nominated for the office of President and Vice-President by the National convention of his party. Said oath shall be notarized by a notary public and filed with the Secretary of the State Election Board no fewer than ninety (90) days prior to the General Election. Failure of any nominee to take and file said oath by said date shall automatically vacate his nomination and a substitute nominee shall be selected by the state central committee of the appropriate political party. It shall be the duty of the Secretary of the State Election Board to notify the chairman of the state central committee of the failure of any nominee to file said oath."

Constitution to the State Legislature, is not restrictive but is definitive and a reasonable regulation of the method of selection of the electors of a recognized political party and not in conflict with the Oklahoma Constitution.

We would affirm our statement in Lillard v. Cordell, 200 Okl. 577, 198 P.2d 417 (1948) that the Legislature has the duty to direct the manner of choosing presidential electors.

This is not to say that there are no limitations upon the power of the state to regulate the selection of presidential electors. In Williams v. Rhodes, *supra*, the Supreme Court spoke to these matters. That case establishes these criteria for such legislation.

(5) The legislative power is subject to the limitation that it may not be exercised in a way that violates other specific provisions of the Constitution.

(6) While the power of the states, under Article II § 1, of the Federal Constitution, to pass laws regulating the selection of presidential and vice-presidential electors is extensive, it cannot be exercised in such a way as to violate express constitutional commands that specifically bar states from passing certain kinds of laws.

The Fifteenth and Nineteenth Amendments are intended to bar the Federal Government and the states from denying the right to vote on grounds of race and sex in presidential elections.

(7) No state can pass a law regulating elections that violates the equal protection clause of the Fourteenth Amendment but this does not make every minor difference in the application of laws to different groups a violation of the Federal Constitution. However, invidious distinctions cannot be enacted without a violation of the clause.

(8) Legislation may not infringe on freedom of association, including the right of individuals to associate for the advancement

of political beliefs. This right is protected by the First Amendment against federal encroachment, and by the Fourteenth Amendment against infringement by the states.

(9) We do not find Oklahoma's recently enacted election code³ to be invidiously discriminatory nor unduly burdensome under the criteria demanded by Williams v. Rhodes.

(10) We believe this state has the duty to regulate all election processes and that the State of Oklahoma has exercised its "compelling interest" reasonably and properly through the election code and under (page 778 Okl.) the Constitutions of the United States and Oklahoma. We have insured the "most precious right" guaranteed to all citizens, the right of franchise.

Petitioners argue that our decision in McCarthy v. Slater et al., 553 P.2d 489 decided July 23, 1976, has insured them a place on the November 1976 presidential ballot. We do not agree.

McCarthy stands for the proposition that persons who are registered as independents are entitled to a place on the presidential ballot as independent electors pledged to a serious independent candidate with no party affiliation.

In the case before us the petitioners scrupulously followed the filing procedures outlined in the State Election Code for candidates of political parties. Respondent does not contest the affidavit of any elector petitioner to the effect he is a nominee of the American Party for presidential elector and if elected will cast his vote for that party's Presidential and Vice-Presidential nominees.

Neither does respondent challenge the timeliness of filing affidavits or notification by the American Party to the Secretary of

³26 O.S.Supp.1975 § 1-101 et seq.

the State Election Board under 26 O.S.Supp.1975 § 5-112⁴ with a supporting petition or alternative cash deposit, as found necessary and proper for "independents" in the McCarthy case.

Even if it can be successfully argued that members of the American Party are not registered as independent voters by virtue of 26 O.S.1975 Supp. § 1-110,⁵ this does not alter or efface their admitted and undisputed allegiance to and membership in the American Party. Petitioners tender the Constitution of the American Party and unequivocally state: "We are in fact a party." In McCarthy the petitioner electors are pledged to an independent candidate. Petitioners in this case are pledged to avowed candidates of the American Party. Herein lies the distinction.

⁴26 O.S.Supp.1975 § 5-112. Petitions and filing fees:

"A Declaration of Candidacy must be accompanied by a petition supporting a candidate's filing signed by five percent (5%) of the registered voters eligible to vote for a candidate in the first election wherein the candidate's name could appear on the ballot, as reflected by the latest January 15 registration report: or by a cashier's check or certified check in the amount of Two Hundred Dollars (\$200.00) for candidates filing with the Secretary of the State Election Board, or in the amount of Fifty Dollars (\$50.00) for candidates filing with the secretary of a county election board; provided, however, such cashier's check or certified check shall be in the amount of One Thousand Five Hundred Dollars (\$1,500.00) for candidates for Governor."

⁵26 O.S.Supp.1975 § 1-110. Changes in party affiliation: "The secretary of each county election board shall, within sixty (60) days after such proclamation by the State Election Board, change to Independent the party affiliation on the registration form of each registered voter of a political party which ceases to be a recognized political party."

We find the petitioners filed for a place on the ballot as electors as members and nominees of the American Party. They do not seek to be placed on the ballot pledged to independent candidates but rather to candidates who are standard bearers of the American Party. This position is borne out by the uncontested statements presented by each petitioner to the State Election Board and by the statements and arguments made at the hearing on this application. Petitioners totally fail to act as independents.

We are not unmindful of petitioners' argument that because they sought no candidate for state office or to put up no slate of candidates for the various county, state or municipal races in the November election, they are not a political party but nominees of a "special character" for "presidential electors." Such argument is without merit if the Constitution of the United States, Art. II, § 1, cl. 2 gives to the states, reasonable regulatory powers over presidential elections.

(11) The American Party ceased to be recognized when it failed to receive 10% of the total vote cast⁶ under 26 O.S.Supp. 1975 § 1-109.⁷ Neither did it comply with requirements of 26

⁶In this connection petitioners offered no objections to our taking judicial notice of the results of preceding elections. Cf. present code to the previous election law, 26 O.S.1971 § 112.

⁷§ 1-109. Party ceases to exist. "Any recognized political party whose nominee for Governor or nominees for electors for President and Vice-President fail to receive at least ten percent (10%) of the total votes cast for said offices in any General Election shall cease to be a recognized political party. Said party may regain recognition only by following the procedure prescribed for formation of new political parties. The State Election Board shall proclaim the fact of a party's failure to receive a sufficient number of votes and shall order that said party cease to be recognized."

O.S.Supp.1975 §§ 1-107, 1-108⁸ to form a new political party.

McCarthy does not overrule or destroy the reasonable regulatory power vested in this state. Williams v. Rhodes, *supra*.

⁸§ 1-107. Recognized political parties. "Recognized political parties shall include parties whose candidates' names appeared on the General Election ballot in 1974 and those parties which shall be formed according to law."

§ 1-108. Formation of new political parties. "A group of persons may form a recognized political party at any time except during the period between July 1 and November 15 of any even-numbered year if the following procedure is observed:

1. Notice of intent to form a recognized political party must be filed in writing with the Secretary of the State Election Board at any time except during the period between March 1 and November 15 of any even-numbered year.

2. Within ninety (90) days after said notice is filed, petitions seeking recognition of a political party, in a form to be prescribed by the Secretary of the State Election Board, shall be filed with said Secretary, bearing the signatures of registered voters equal to at least five percent (5%) of the total votes cast in the last General Election either for Governor or for electors for President and Vice-President. Each page of said petitions must contain the names of registered voters from a single county.

3. Within thirty (30) days after receipt of said petitions, the State Election Board shall determine the sufficiency of said petitions. If said Board determines there are a sufficient number of valid signatures of registered voters, the party becomes recognized under the laws of the State of Oklahoma with all rights and obligations accruing thereto."

WRIT DENIED.

WILLIAMS, C. J., and DAVISON, IRWIN, BERRY, LAVENDER and SIMMS, J. J., concur.

BARNES, J., concurs in result.

HODGES, V. C. J., dissents.

HODGES, Vice Chief Justice (dissenting).

I dissent for the reason the Constitution of the State of Oklahoma has prescribed the manner and procedure for the nomination of presidential electors.

Art. 3, § 5 of the Oklahoma Constitution specifically states that presidential electors "shall be nominated by the regularly called conventions of the various political parties." (Emphasis supplied)

Opposed to the above provision of the Constitution, 26 O.S. 1971 § 10-101 places a limitation on the nomination of presidential electors to only those who are members of a recognized political party.

The constitutional provision does not restrict the office of presidential elector to recognized parties, but specifically provides for their nomination from all of the various parties. Therefore, § 10-101 is an unconstitutional infringement of the rights of members of a political party that is not recognized by the State of Oklahoma, thereby depriving them of their right of ballot access for presidential electors.

It also should be pointed out that by statute, if a person is not a member of a "recognized political party," then his status (page 780

Okl.) as a voter is automatically, without his consent or permission, determined to be that of an "independent."

Our recent opinion in McCarthy v. Slater, 553 P.2d 489, 47 OBJ 1674 (Okl. 1976), recognized there was a void in the nomination of presidential electors for an "independent," and held they must be allowed access to the ballot for the November, 1976 General Election.

If Oklahoma by statute does not recognize the American Party and casts them into the role of an independent voter, then they should be accorded the same rights of ballot access to the office of presidential elector as was given to the independent presidential electors for Eugene McCarthy.

I respectfully dissent.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

DELMAS McCLENDON, GLENN O. YOUNG,)
WOLFORD CONOVER, IVA LOUISE CONOVER,) Filed
STUART RATCLIFF, STANLEY CAHA, GRETA) September 24,
PUCKETT, AND VANGIE ECHOHAWK,) 1976
)
Petitioners,)
)
v.) No. 49,974
)
LEE SLATER, Secretary of the State)
Election Board, et al.,)
)
Respondents.)

APPENDIX C

- O R D E R -

Application for Oral Argument Denied. Petition for Rehearing
Denied.

DONE IN CONFERENCE THIS 23rd Day of September, 1976.

/s/ Ben T. Williams

CHIEF JUSTICE

WILLIAMS, C. J., DAVISON, IRWIN, LAVENDER, BARNES,
SIMMS, DOOLIN, J. J., CONCUR.

HODGES, V. C. J., DISSENTS.

CERTIFICATE OF PRESIDENTIAL ELECTORS

I, Wasley S. Krogdahl, Secretary of the American Party National Nominating Convention, which was convened in Salt Lake City, Utah, on June 17, 18 and 19, 1976, do hereby certify to Mr. Lee Slater, Secretary of the State Election Board of the State of Oklahoma, the following eight (8) Presidential Electors to be on the Oklahoma 1976 General Election ballot, who are members of the American Party and who are pledged to vote for Thomas J. Anderson for President of the United States of America and Rufus Shackleford for Vice President of the United States of America, both having been nominated for said offices by the regularly called National Nominating Convention of the American Party, as aforementioned, to wit:

DELMAS McCLENDON	5435 S. Marion St.	Tulsa, OK
GLENN O. YOUNG	P. O. Box 1086	Sapulpa, OK
WOLFORD CONOVER	1401 Madison Blvd.	Bartlesville, OK
IVA LOUISE CONOVER	1401 Madison Blvd.	Bartlesville, OK
STUART RATCLIFF	R. R. 4, Box 158-B	Lawton, OK
STANLEY CAHA	R. R. 1	Cache, OK
GRETA PUCKETT	601 N. Flamingo	Ok. City, OK
VANGIE ECHOHAWK	2610 E. 56th St. N.	Tulsa, OK

Sincerely,

/s/ Wasley S. Krogdahl
Secretary
American Party National
Nominating Convention
3493 Castleton Way North
Lexington, Kentucky 40502

State of Kentucky)
County of Fayette)

On the 21st day of July, 1976, before me came Wasley S. Krogdahl, to me known to be the individual described in, and who executed, the foregoing instrument and acknowledged that he executed the same.

/s/ Anne T. Hembree

My Commission Expires 8-17-79

Notary Public

CERTIFICATE OF PRESIDENTIAL ELECTORS

I, Sam McDonnell, Chairman of the American Party National Nominating Convention which was convened in Salt Lake City, Utah, on June 17, 18 and 19, 1976, do hereby certify to Mr. Lee Slater, Secretary of the State Election Board of the State of Oklahoma, the following eight (8) Presidential Electors to be on the Oklahoma 1976 General Election ballot, who are members of the American Party and who are pledged to vote for Thomas J. Anderson for President of the United States of America and Rufus Shackleford for Vice President of the United States of America, both having been nominated for said offices by the regularly called National Nominating Convention of the American Party, as aforementioned, to wit:

DELMAS McCLENDON	5435 S. Marion St.	Tulsa, OK
GLENN O. YOUNG	P. O. Box 1086	Sapulpa, OK
WOLFORD CONOVER	1401 Madison Blvd.	Bartlesville, OK
IVA LOUISE CONOVER	1401 Madison Blvd.	Bartlesville, OK
STUART RATCLIFF	R. R. 4, Box 158-B	Lawton, OK
STANLEY CAHA	R. R. 1	Cache, OK
GRETA PUCKETT	601 N. Flamingo	Ok. City, OK
VANGIE ECHOHAWK	2610 E. 56th St. N.	Tulsa, OK

/s/ Sam McDonnell

Chairman
American Party National
Nominating Convention, 1976

State of Texas)
County of Dallas)

Subscribed and sworn before me this 19th day of July, 1976.

/s/

Notary Public

My Commission Expires

CERTIFICATION OF PRESIDENTIAL ELECTORS

I, JOSEPH L. DURM, Chairman of the American Party in Oklahoma, do certify the following eight (8) Independent Presidential Electors to be on the Oklahoma 1976 General Election ballot, who are members of the nationally recognized American Party and who were transferred unconstitutionally without their consent to Independent by Oklahoma Senate Bill 415 in May, 1974, thereby violating their constitutional rights as guaranteed by U.S. Code 18, Sections 241 and 242, and who are pledged to vote for Thomas Jefferson Anderson for President of the United States of America and Rufus Shackelford for Vice-President of the United States of America, both being nominated for those offices by the National Nominating Convention of the American Party at Salt Lake City, Utah, on June 18th and 19th, 1976:

**NOMINEES FOR PRESIDENTIAL ELECTORS
AS INDEPENDENTS**

<u>Name</u>	<u>Address</u>	<u>City</u>
DELMAS McCLENDON	5435 S. Marion St.	Tulsa, OK
GLENN O. YOUNG	P. O. Box 1086	Sapulpa, OK
WOLFORD CONOVER	1401 Madison Blvd.	Bartlesville, OK
IVA LOUISE CONOVER	1401 Madison Blvd.	Bartlesville, OK
STUART RATCLIFF	R. R. 4, Box 158-B	Lawton, OK
STANLEY CAHA	R. R. 1	Cache, OK
GRETA PUCKETT	601 N. Flamingo	Ok. City, OK
VANGIE ECHOHAWK	2610 E. 56th St. N.	Tulsa, OK

/s/ Joseph L. Durm

State Chairman
American Party in Oklahoma

/s/ Iva Louise Conover

State Secretary
American Party in Oklahoma

STATE OF OKLAHOMA)
)
COUNTY OF WASHINGTON) SS.

Subscribed and sworn to before me this 2nd day of July, 1976.

My Commission Expires: /s/ Virginia S. Bailey

January 24, 1978

Notary Public

OATH FOR PRESIDENTIAL ELECTOR

In accordance with Article X, Section 102 of the Oklahoma Election Code, I, Delmas McClendon, being a member of the American Party, do solemnly swear as a nominee for Presidential Elector for the American Party that, if elected, I will cast my ballot for Thomas J. Anderson for President and Rufus Shackelford for Vice President, both being nominated for those offices by the regularly called National Convention of the American Party at Salt Lake City, Utah, on the 18th and 19th of June, 1976.

/s/ Delmas McClendon

Nominee for Presidential Elector
for the American Party

State of Oklahoma)
County of Tulsa) ss.

Subscribed and sworn to before me this 21st day of July, 1976.

My Commission Expires /s/ Judith L. Henley

5-15-77 Notary Public

C5

OATH FOR PRESIDENTIAL ELECTOR

In accordance with Article X, Section 102 of the Oklahoma Election Code, I, Glenn O. Young, being a member of the American Party, do solemnly swear as a nominee for Presidential Elector for the American Party that, if elected, I will cast my ballot for Thomas J. Anderson for President and Rufus Shackelford for Vice President, both being nominated for those offices by the regularly called National Convention of the American Party at Salt Lake City, Utah, on the 18th and 19th of June, 1976.

/s/ Glenn O. Young

Nominee for Presidential Elector
for the American Party

STATE OF OKLAHOMA)
)
COUNTY OF CREEK) SS

Before me, the undersigned, a Notary Public in and for said State, on this the 21st day of July, 1976, personally appeared Glenn O. Young, to me known to be the identical person who executed the within and foregoing instrument.

In witness whereof, I have hereunto set my hand and official seal the day and year last above written.

/s/ Gertrude S. Cobbs

Notary Public

My Commission Expires:

April 23, 1979

C6

OATH FOR PRESIDENTIAL ELECTOR

In accordance with Article X, Section 102 of the Oklahoma Election Code, I, Wolford Conover, being a member of the American Party, do solemnly swear as a nominee for Presidential Elector for the American Party that, if elected, I will cast my ballot for Thomas J. Anderson for President and Rufus Shackelford for Vice President, both being nominated for those offices by the regularly called National Convention of the American Party at Salt Lake City, Utah, on the 18th and 19th of June, 1976.

/s/ Wolford Conover

Nominee for Presidential Elector
for the American Party

State of Oklahoma)
County of Washington) ss:

Subscribed and sworn to before me this 21st day of July, 1976.

/s/ LoVenea York

Notary Public

My Commission Expires February 27, 1978

C7

OATH FOR PRESIDENTIAL ELECTOR

In accordance with Article X, Section 102 of the Oklahoma Election Code, I, Iva Louise Conover, being a member of the American Party, do solemnly swear as a nominee for Presidential Elector for the American Party that, if elected, I will cast my ballot for Thomas J. Anderson for President and Rufus Shackelford for Vice President, both being nominated for those offices by the regularly called National Convention of the American Party at Salt Lake City, Utah, on the 18th and 19th of June, 1976.

/s/ Iva Louise Conover

Nominee for Presidential Elector
for the American Party

State of Oklahoma)
County of Washington) ss:

Subscribed and sworn to before me this 21st day of July, 1976.

/s/ LoVenea York

Notary Public

My Commission expires February 27, 1978

C8

OATH FOR PRESIDENTIAL ELECTOR

In accordance with Article X, Section 102 of the Oklahoma Election Code, I, Greta Puckett, being a member of the American Party, do solemnly swear as a nominee for Presidential Elector for the American Party that, if elected, I will cast my ballot for Thomas J. Anderson for President and Rufus Shackelford for Vice President, both being nominated for those offices by the regularly called National Convention of the American Party at Salt Lake City, Utah, on the 18th and 19th of June, 1976.

/s/ Greta Puckett

Nominee for Presidential Elector
for the American Party

STATE OF OKLAHOMA
COUNTY OF OKLAHOMA COUNTY SS:

Subscribed and sworn to before me this 21st day of July, 1976.

/s/ Gerald D. Phillips

Notary Public

My commission expires 3/5/78

C9

OATH FOR PRESIDENTIAL ELECTOR

In accordance with Article X, Section 102 of the Oklahoma Election Code, I, Vangie Echohawk, being a member of the American Party, do solemnly swear as a nominee for Presidential Elector for the American Party that, if elected, I will cast my ballot for Thomas J. Anderson for President and Rufus Shackelford for Vice President, both being nominated for those offices by the regularly called National Convention of the American Party at Salt Lake City, Utah, on the 18th and 19th of June, 1976.

/s/ Vangie Echohawk

Nominee for Presidential Elector
for the American Party

State of Oklahoma)
County of Tulsa) ss.

Subscribed and sworn to before me this 21st day of July, 1976.

/s/ Judith L. Henley

Notary Public

My Commission Expires 5-15-77

C10

OATH FOR PRESIDENTIAL ELECTOR

In accordance with Article X, Section 102 of the Oklahoma Election Code, I, Stanley L. Caha, being a member of the American Party, do solemnly swear as a nominee for Presidential Elector for the American Party that, if elected, I will cast my ballot for Thomas J. Anderson for President and Rufus Shackelford for Vice President, both being nominated for those offices by the regularly called National Convention of the American Party at Salt Lake City, Utah, on the 18th and 19th of June, 1976.

/s/ Stanley L. Caha

Nominee for Presidential Elector
for the American Party

State of Oklahoma)
County of Commanchie) ss.

Subscribed and sworn to before me this 21st day of July, 1976.

/s/ Paul A. Meinz

Notary Public

My Commission Expires February 15, 1978

OATH FOR PRESIDENTIAL ELECTOR

In accordance with Article X, Section 102 of the Oklahoma Election Code, I, Stuart Ratcliff, being a member of the American Party, do solemnly swear as a nominee for Presidential Elector for the American Party that, if elected, I will cast my ballot for Thomas J. Anderson for President and Rufus Shackelford for Vice President, both being nominated for those offices by the regularly called National Convention of the American Party at Salt Lake City, Utah, on the 18th and 19th of June, 1976.

APPENDIX D

/s/ Stuart Ratcliff

Nominee for Presidential Elector
for the American Party

State of Oklahoma)
County of Commanchie) ss.

Subscribed and sworn to before me this 21st day of July, 1976.

/s/ Paul A. Meinz

Notary Public

My Commission Expires February 15, 1978

553 PACIFIC REPORTER, 2d SERIES 489 Okl.

Eugene McCARTHY et al., Petitioners,

v.

Lee SLATER, Secretary of the State Election Board, et al., Respondents.

No. 49899.

Supreme Court of Oklahoma.

July 23, 1976.

Page 490 Okl.

An original action on application to assume original jurisdiction and for writ of mandamus to require the acceptance of Declaration of Candidacy of certain of the petitioners and the placement of their names on the November, 1976 General Election ballot as non-partisan candidates for Presidential Electors.

JURISDICTION ASSUMED AND WRIT OF MANDAMUS GRANTED.

Irving L. Faught, John C. Gatlin, Oklahoma City, for petitioners.

Larry Derryberry, Atty. Gen., Michael Cauthron, Angela Ables, Asst. Attys. Gen., Oklahoma City, for respondents.

LAVENDER, Justice:

Petitioners, William Nerin, Paula Kesselring, James Barrett, Donald Allen, Ronald McGuffee, Joanne Forgue, Paul N. Denner, and James Murray (candidates), individually sought to become a

non-partisan candidate for Presidential Elector and have each of their names printed on the November, 1976, General Election ballot as an independent sworn to support Eugene McCarthy for the Office of the President. Petitioner Eugene McCarthy, as an independent candidate for President, sought the other petitioners (candidates) to be placed on the ballot as independent candidates for Presidential Electors for him. By affidavit, McCarthy asserted he is an independent candidate for the Presidency and his candidacy is a serious effort. The Secretary of the State Election Board, Slater, (Secretary), refused the filings.

By this original action, petitioners ask this court to assume original jurisdiction and issue writ of mandamus against the respondents, the State Election Board, its Secretary, and other proper officials for the necessary relief. Parties make this controversy a matter of law and do not put at issue matters of fact.

The original jurisdiction of this court extends to a general superintending over all Agencies and Boards created by law. Const. Art. 7, § 4. We assume jurisdiction of this matter.

(1) The Supreme Court of the United States has many times given constitutional protection to the elector, his vote, and the ballot. A qualified citizen is constitutionally protected in his right to vote and have that vote counted.¹ "No right is more precious in a free country than that of having a voice in the election of those who make the law under which, as good citizens, we must live."² Voting freely for the candidate of one's choice is the essence

¹Ex Parte Yarbrough, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274; United States v. Mosley, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355; Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663; United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368.

²Wesberry v. Sanders, 376 U.S. 1, 17, 84 S.Ct. 526, 11 L.Ed.2d 481.

of a (page 491 Okl.) democratic society. A restriction on that right strikes at the heart of representative government.³

Our present election code became effective January 1, 1975. It was codified as Title 26 of the Oklahoma Statutes. Laws 1974, c. 152. Presidential Electors is the subject of Article X of that code. § 10-101, et seq. It allows the nominees for Presidential Electors of any recognized political party to appear as candidates on the General Election ballot. That article continues with necessary machinery so an individual elector at the appropriate General Election⁴ may effectively cast his vote for a recognized political party's candidates for President and Vice President by voting for that party's candidates for Presidential Electors.

Petitioners argue the denial of the acceptancy of their candidacy as independents for Presidential Elector and through them the independent candidacy of McCarthy for President is a violation of the United States Constitution under the First, Twelfth, and Fourteenth amendments.

Respondents, the Board and its Secretary, argue (1) petitioners' accessibility to the ballot as a recognized political party and then through Article X of the Code, particularly §§ 1-108, 10-101 through 109; (2) limitation of candidacy for Presidential Elector to nominees of a recognized political party is a proper control of the ballot to protect it from being impeded by sheer weight of numbers, and frivolous or fraudulent candidacies; and (3) petitioner candidates are a political party by each swearing to support candidate McCarthy for President.

³Reynolds v. Simms, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506.

⁴The appropriate General Election is that one in November in the year next preceding the expiration of the term of office of President. 26 O.S.1974, § 10-103.

"**** (T)he political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other." Storer v. Brown, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714. That opinion refused to require an independent candidate to accept the formation of a new political party as an alternative and his constitutional way to obtain access to the ballot. This requires the non-party man to consider himself a party man for the purpose of becoming a candidate. The political party route cannot be made his sole route.

(2) A state has a legitimate interest in regulating the number of candidates on the ballot. Jenness v. Fortson, 409 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554. After citing Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24, this language is found in Storer, supra:

"Similarly, here, we perceive no sufficient state interest in conditioning ballot position for an independent candidate on his forming a new political party as long as the State is free to assure itself that the candidate is a serious contender, truly independent, and with a satisfactory level of community support." (Emphasis added.)

In Jenness, supra, a state statute was upheld that required of an independent candidate a nominating petition, signed by not less than five per cent of the total number of eligible electors in the last election, to have his name on the ballot at the general election.

Oklahoma's election code through Article X and § 1-108 provides for adequate, sufficient, and constitutional controls for protecting its legitimate interest in the selection of Presidential Electors from recognized political parties. Permissive control to protect the legitimate state interest as to independent candidates for Presidential Electors, and through them an independent candidate for President, has not been legislatively exercised through the statutory election code presently in effect in this state. (page 492 Okl.)

(3) Here the petitioner candidates have sworn to support McCarthy as an independent candidate for President. This alone does not make a political party. As said in Storer, supra:

"A new party organization contemplates a statewide, ongoing organization with distinctive political character. Its goal is typically to gain control of the machinery of state government by electing its candidates to public office. From the standpoint of a potential supporter, affiliation with the new party would mean giving up his ties with another party or sacrificing his own independent status, even though his possible interest in the new party centers around a particular candidate for a particular office." (Emphasis added.)

This court in Swindall v. State Election Board, 168 Okl. 97, 32 P.2d 691, mentioned elements of a political party to include "united in opinion and organized in the manner usual to the then existing political parties." Nothing here indicates the petitioners have an ongoing organization usual to existing political parties.

Although one might challenge the possibility of success of the independent candidacy of McCarthy, it is difficult to challenge the seriousness of that candidacy. His supporting affidavit sets out his serious effort to win the presidency, his political experiences, and record, and the substantial number of states in which his independent candidacy will appear on the general election ballot. Each of the independent Presidential Electors in this case complied with § 5-112 of the election code by tendering a filing fee. That section requires a Declaration of Candidacy to be accompanied by a supporting petition of a particular percent or a filing fee. This suggests the seriousness of a candidacy may be established through either a support petition or payment of a fee.

(4,5) We hold an independent candidate cannot be required to be a member of a recognized political party to have access to the ballot; by swearing their support of an independent candidate for

President, the petitioner candidates are not a political party required to become recognized by complying with § 1-108 to appear on the ballot; and there is presently no permitted statutory control based on a legitimate state interest as to independent Presidential Electors candidates. The petitioners must be allowed access to the ballot for the November, 1976 General Election.

Jurisdiction assumed and writ of mandamus granted.

WILLIAMS, C. J., HODGES, V. C. J., and DAVISON, IRWIN, SIMMS and DOOLIN, J. J., concur.

BERRY and BARNES, J. J., dissent.

VOTING STATISTICS OF OKLAHOMA (1)

APPENDIX E

YEAR OF GENERAL ELECTION	NUMBER VOTING (2)	NUMBER OF PETITIONERS REQUIRED OF NEW PARTIES SEEKING BALLOT POSITION (3)
1922	514,616	5,000
1924	527,928	5,000
1926	387,308	5,000
1928	618,427	5,000
1930	511,320	5,000
1932	704,633	5,000
1934	628,331	5,000
1936	749,740	5,000
1938	507,956	5,000
1940	826,212	5,000
1942	378,781	5,000
1944	722,636	5,000
1946	494,599	5,000
1948	721,599	5,000
1950	644,276	5,000
1952	948,984	5,000
1954	609,194	5,000
1956	859,350	5,000
1958	538,839	5,000
1960	903,150	5,000
1962	709,963	5,000
1964	932,499	5,000
1966	677,258	5,000
1968	943,086	5,000
1970	698,790	5,000
1972	1,029,900	5,000
TOTAL	17,789,375	130,000

VOTING STATISTICS OF OKLAHOMA (1)

(Continued)

YEAR OF GENERAL ELECTION	NUMBER OF POLITICAL PARTIES ON BALLOT	PERCENT
1922	3	.972
1924	4	.947
1926	4	1.290
1928	4	.808
1930	2	.978
1932	2	.710
1934	4	.796
1936	4	.667
1938	3	.984
1940	3	.605
1942	3	1.320
1944	3	.692
1946	2	1.010
1948	2	.693
1950	2	.776
1952	2	.527
1954	2	.821
1956	2	.582
1958	2	.928
1960	2	.554
1962	2	.704
1964	2	.536
1966	2	.738
1968	3	.530
1970	3	.716
1972	3	.485
TOTAL		.731

- (1) These statistics were taken from page 401 of the 1975 Directory of Oklahoma, published by the Oklahoma State Election Board.
- (2) Number voting for Governor or President in the General Elections.
- (3) History: Session Law 1923-4, Ch. 151. H.J.R. 8. Approved March 18, 1924. See data attached from Oklahoma Statutes 1931, Vol. I, Chap. 29, Art. 3, Section 5650, page 1645. For more than 50 years, the signatures of 5,000 voters were required by petition to establish new parties. There were never more than four political parties on the ballot. For twenty-two consecutive years from 1945 to 1968, only the Democrats and Republicans were on the ballot.

CONCLUSION: In 1974, there were 804,848 votes cast in the General Election for Governor. Applying the average percentage of 5,000 petitioners to the number of voters casting their ballots for President and Governor for the past fifty years .731% times 804,848 equals 5,883. Now applying 5% of 804,848, the total votes cast in the 1974 General Election, as required by SB415, 40,242 petitioners would be needed. Now dividing 34,359 (40,242 minus 5,883) by 5,883, we see that an oppressive increase of 584%, using the average for the past fifty years, has been used as an additional burden to break the back of the American Party in Oklahoma and more than eight times the requirement of 5,000 imposed by the previous statute of 1924. These statistics testify brutally to the fact that an Oklahoma Democrat-Republican Legislature by its passage of SB 415 in 1974, has oppressed, crushed, burdened, and trampled down by abuse of power and authority U. S. citizens of other political parties in their free exercise and enjoyment of the constitutional right of political association and political activity secured to them by the Constitution of the United States.

Supreme Court of the United States
F I L E D
January 19, 1977

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-848

DELMAS McCLENDON, ET AL.,
Petitioners,

VERSUS

LEE SLATER, Secretary of the
State Election Board, et al.,
Respondents.

BRIEF OPPOSING CERTIORARI

LARRY DERRYBERRY
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In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-848

DELMAS McCLENDON, ET AL.,
Petitioners,

VERSUS

LEE SLATER, Secretary of the
State Election Board, et al.,
Respondents.

BRIEF OPPOSING CERTIORARI

STATEMENT OF CASE

The petitioners on July 6, 1976, filed with respondents certain declarations and oaths as Presidential Electors of the American Party seeking ballot access on the November, 1976, General Election ballot in the State of Oklahoma. The documents tendered by petitioners were refused because of the failure of petitioners to comply with Oklahoma statutes controlling ballot access for potential Presidential Electors. Thereafter, the petitioners sought a writ of mandamus in the Oklahoma Supreme Court to compel respondents to place their names on the General Election ballot as Presidential Electors for the American Party and its candidates, Thomas Jefferson Anderson for President of the United States and Rufus Shackelford for Vice President of the United States.

The Oklahoma Supreme Court heard oral arguments and on the 19th day of August, 1976, denied the writ. The Oklahoma Supreme Court held that the provisions of the Oklahoma Statutes under consideration were not unconstitutional and did not discriminate against petitioners. Thereafter, petitioners sought a rehearing which was denied on September 24, 1976.

The case at bar was docketed on December 21, 1976.

QUESTION PRESENTED

DID THE DENIAL OF BALLOT POSITION AS PRESIDENTIAL ELECTORS DENY PETITIONERS THEIR CONSTITUTIONAL RIGHTS?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article II, § 1, Cl. 2 of the United States Constitution, provides in pertinent part:

"Each state shall appoint in such manner as the Legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the Congress. . . ."

Title 26 O.S. Supp. 1976, § 10-101, provides:

"The nominees for Presidential Electors of any recognized political party shall be selected at a statewide convention of said party in a manner to be determined by said party. The nominees for Presidential Electors shall be certified by said party's chairman to the Secretary of the State Election Board no fewer than ninety

(90) days nor more than one hundred eighty (180) days from the date of the General Election at which candidates for Presidential Electors shall appear on the ballot. Failure of a political party to properly certify the names of its nominees for Presidential Electors within the time specified shall bar such party from placing any candidates for Presidential Electors on the ballot at said election."

Title 26 O.S. Supp. 1976, § 1-107, provides:

"'Recognized political parties' shall include parties whose candidates' names appeared on the General Election ballot in 1974, and those parties which shall be formed according to law."

Title 26 O.S. Supp. 1976, § 1-108, provides:

"A group of persons may form a recognized political party at any time except during the period between July 1 and November 15 of any even-numbered year if the following procedure is observed:

"1. Notice of intent to form a recognized political party must be filed in writing with the Secretary of the State Election Board at any time except during the period between March 1 and November 15 of any even-numbered year.

"2. Within ninety (90) days after said notice is filed, petitions seeking recognition of a political party, in a form to be prescribed by the Secretary of the State Election Board, shall be filed with said Secretary, bearing the signatures of registered voters equal to at least five percent (5%) of the total votes cast in the last General Election either for Governor or for electors for President and Vice President. Each page of said petitions must contain the names of registered voters from a single county.

"3. Within thirty (30) days after receipt of said petitions, the State Election Board shall determine the sufficiency of said petitions. If said Board determines there are a sufficient number of valid signatures of registered voters, the party becomes recognized under the laws of the State of Oklahoma with all rights and obligations accruing thereto."

Title 26 O.S. Supp. 1976, § 1-109, provides:

"Any recognized political party whose nominee for Governor or nominees for electors for President and Vice President fail to receive at least ten percent (10%) of the total votes cast for said offices in any General Election shall cease to be a recognized political party. Said party may regain recognition only by following the procedures prescribed for formation of new political parties. The State Election Board shall proclaim the fact of a party's failure to receive a sufficient number of votes and shall order that said party cease to be recognized."

PROPOSITION I

THE DENIAL OF BALLOT POSITION AS PRESIDENTIAL ELECTORS DID NOT DEPRIVE PETITIONERS OF THEIR CONSTITUTIONAL RIGHTS AND A WRIT OF CERTIORARI SHOULD BE DENIED.

The eight petitioners sought ballot position as Presidential Electors committed to the candidacies of Thomas Jefferson Anderson and Rufus Shackelford, the American Party nominees for the offices of President and Vice President of the United States, respectively. The Secretary of the State Election Board refused to accept the declarations of candidacy of the petitioners. Respondents contend that the Secretary properly refused the efforts of petitioners and

that the Oklahoma Supreme Court fully and correctly considered the issues presented, the applicable constitutional and statutory provisions, and the prior decisions of this Court.

A plain reading of the United States Constitution reveals that the States acting through their Legislatures are granted the authority to establish the procedure for the selection of Presidential Electors. Article 2, § 1, Cl. 2. Obviously, the manner of selection of Presidential Electors must be free of constitutional infirmity. *Williams v. Virginia State Board of Elections*, 283 F.Supp. 622 (D.C. Va. 1968).

The Oklahoma Legislature enacted statutes in 1974 (operative in January, 1975) relating to the selection of Presidential Electors by "recognized political parties." Title 26 O.S. Supp. 1976, §§ 10-101 to 10-109. The term "recognized political party" is defined elsewhere in the statutes to include political parties whose candidates' names appeared on the General Election ballot in 1974 and "those parties which shall be formed according to law." Title 26 O.S. Supp. 1976, § 1-107. A relatively painless and wholly reasonable procedure for formation of a party is found at 26 O.S. Supp. 1976, § 1-108. The section requires notice of intent to form a party and the circulation of petitions to procure signatures of 5% of the total votes cast in the last General Election. This procedure was available to petitioners in the instant case. They sought to avail themselves of it and were apparently unsuccessful. Petitioners then attempted to attain ballot access by simply filing declarations and pursuing their remedies in the courts after the declarations were refused.

The procedure established by the Oklahoma Legislature in Section 1-108, *supra*, is not discriminatory or burdensome. The petitioners cite the case of *Eugene McCarthy, et al. v. Slater*, 553 P.2d 489 (Okl. 1976), and attempt to show themselves on equal footing with *independents* who sought ballot access in that case. McCarthy and his fellow petitioners (eight candidates for ballot positions as independent Presidential Electors) were successful in the Oklahoma Supreme Court because of the deficiency of Section 1-108 in providing a means of achieving ballot position as non-partisans. Petitioners in the instant case were by their own declarations committed to the principles and candidates of a "party," i.e., the American Party. As a matter of fact, the American Party had candidates on the General Election ballot in Oklahoma as late as 1972, but the failure of the candidates of the party to gain 10% of the total votes cast resulted in the dissolution of the party by operation of law. Title 26 O.S. Supp. 1976, § 1-109.

The holding of the Oklahoma Supreme Court in considering the issues presented by these petitioners is wholly consistent with the decisions of this Court. A procedure to achieve ballot position by a political organization in Georgia was scrutinized by this Court in *Jenness, et al. v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970 (1971), wherein the following language appears:

"The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. Georgia has not been guilty of invidious discrimination in recognizing these differences and pro-

viding different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in *Williams v. Rhodes*, *supra*.

"There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election. The 5% figure is, to be sure, apparently somewhat higher than the percentage of support required to be shown in many States as a condition for ballot position, but this is balanced by the fact that Georgia has imposed no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishes. Georgia in this case has insulated not a single potential voter from the appeal of new political voices within its borders."

Like Georgia, Oklahoma places no burdensome restrictions on ballot access beyond the 5% requirement.

In *American Party of Texas v. White*, 415 U.S. 767, 94 S.Ct. 1296 (1974), a Texas election statute governing ballot position by new political parties was fully considered. The Texas statute provided that where candidates of a party polled less than 2% of the total gubernatorial vote or did not nominate a candidate for Governor, the party was required to pursue a third avenue of acquiring ballot position, namely, precinct nominating conventions and, if the required support was not found in the precinct conventions, the circulation of petitions for signatures. See *Texas Election Code*, Art. 13.45(2) (Supp. 1973).

In upholding the Texas statutes in the face of claims that they were violative of the Equal Protection Clause of the Fourteenth Amendment and impermissibly burdensome on rights protected by the First and Fourteenth Amendments, the Court, in its opinion delivered by Mr. Justice White said:

"We have concluded that these claims are without merit. We agree with the District Court that whether the qualifications for ballot position are viewed as substantial burdens on the right to associate or as discriminations against parties not polling 2% of the last election vote, their validity depends upon whether they are necessary to further compelling state interests, *Storer v. Brown*, 415 U.S., at 729-733, 39 L. Ed.2d, at 723-725. But we also agree with the District Court that the foregoing limitations, whether considered alone or in combination, are constitutionally valid measures, reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways.

" . . .

"In sum, Texas 'in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life.' *Jenness v. Fortson*, 403 U.S. at 439, 29 L. Ed. 2d 554. It affords minority political parties a real and essentially equal opportunity for ballot qualification. Neither the First and Fourteenth Amendments nor the Equal Protection Clause of the Fourteenth Amendment requires any more."

It is respectfully submitted that the Oklahoma Supreme Court has correctly interpreted the questions presented by petitioners in accord with the applicable decisions of this Court.

CONCLUSION

In light of the foregoing argument and authorities, it is requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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January, 1977

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument to which this certification is attached was mailed to the following this _____ day of _____, 1977:

Robert Lee Blackwood
Attorney-at-Law
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Tulsa, Oklahoma 74119

MICHAEL CAUTHRON